



(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2005-06

(session year)

Senate

(Assembly, Senate or Joint)

Committee on Natural Resources and
Transportation...

COMMITTEE NOTICES ...

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INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

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- Miscellaneous ... **Misc**

Senate

Record of Committee Proceedings

Committee on Natural Resources and Transportation

Clearinghouse Rule 06-043

Relating to motor carrier safety.

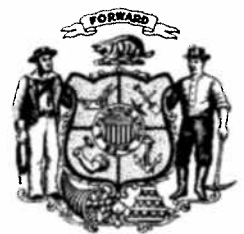
Submitted by Department of Transportation.

June 15, 2006	Referred to Committee on Natural Resources and Transportation.
July 14, 2006	Meeting with agency requested per Wisconsin Statutes 227.19 (4)(b) 1a
August 17, 2006	No action taken.

Matt Phillips
Committee Clerk



WISCONSIN STATE LEGISLATURE





Wisconsin Department of Transportation

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Governor

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The Honorable Senator Neal Kedzie
Chairman, Senate Transportation Committee
Room 313 South
State Capitol
Madison, Wisconsin 53707

June 15, 2006

The Honorable Representative John Ainsworth
Chairman, Assembly Transportation Committee
Room 309 North, State Capitol
Madison, Wisconsin 53702

RE: Proposed Administrative Rule **TRANS 327**
Notification of Legislative Standing Committees
CLEARINGHOUSE RULE 06-043

Dear Senator Leibham and Representative Ainsworth:

In accordance with the Department of Transportation's efforts to keep you informed of its ongoing rule making actions, enclosed is a courtesy copy of Final Draft rule **Trans 327**, relating to **motor carrier safety**, which is being submitted to the Legislature for committee review.

Sincerely,

A handwritten signature in black ink that reads "Julie A. Johnson".

Julie A. Johnson
Paralegal

JAJ/dim

Enclosure

cc: Supt. David Collins
Capt. Chuck Teasdale

CR 06-043

The Wisconsin Department of Transportation proposes an order to repeal TRANS 327.01(2)(b) and (c), and (e) to (h), 327.05(3) and (4), and 327.09(6) to (12); renumber TRANS 327.01(2)(d), 327.05(5) and (6), and 327.09(13); amend TRANS 327.03(intro.), (2) and (7), 327.07(2), and 327.09(5)(intro.), (b) and (c); and create TRANS 327.03(10) and 327.09(7), relating to motor carrier safety.

**REPORT OF THE DEPARTMENT OF TRANSPORTATION
ON THE FINAL RULE DRAFT**

This report is submitted to the presiding officers of the Senate and Assembly for referral to the appropriate standing committees. The report consists of the following parts:

Part 1--Analysis prepared by the Department of Transportation.

Part 2--Rule text in final draft form.

Part 3--Recommendations of the Legislative Council.

Part 4--Analysis prepared pursuant to the provisions of s. 227.19(3), Stats.

Submitted by:



JOE MAASSEN

Attorney

Office of General Counsel

Department of Transportation

Room 115-B, Hill Farms State

Transportation Building

P. O. Box 7910

Madison, WI 53707-7910

(608) 266-7364

PART 1

Analysis Prepared by the Wisconsin Department of Transportation

Statutes interpreted: ss. 110.07 and 110.075, and ch. 194, Stats.

Statutory authority: ss. 110.07, 110.075, 194.38, 194.43 and 227.11, Stats.

Explanation of agency authority: The secretary shall set standards and adopt rules to establish a plan of inspection to implement the inspection program. It shall be the duty of the Department to prescribe rules and regulations as to safety and operations and the hours of service of drivers of motor vehicles operated under the authority of this chapter.

Related statute or rule: ss. 110.07, Stats.

Plain language analysis: This rule making will amend ch. Trans 327, relating to intrastate motor carrier safety regulations, to bring it into compliance with the most recent changes to the Federal Motor Carrier Safety Regulations which went into effect on April 1, 2006. Amendment of this rule will assure State Patrol inspectors and troopers are enforcing the most recent Federal Motor Carrier Safety regulations for intrastate carriers. The update of this rule will also keep the Department in compliance to qualify for continued Motor Carrier Safety Assistance Program (MCSAP) funding.

The Department annually updates ch. Trans 327 to keep current with the most recent changes to 49 CFR parts 390, 391, 392, 393, 395, 396 and 397.

In addition, the adoption of Trans 327 will give the Department the authority to use federal standards by which traffic officers and state patrol inspectors declare vehicles and drivers out of service. The offices of the Attorney General and the Revisor of Statutes Bureau have consented to the incorporation by reference of the revised North American Uniform Out-of-Service Criteria under the provision of § 227.21(2), Stats.

Summary of, and preliminary comparison with, existing or proposed federal regulation: Trans 327 (Motor Carrier Safety) adopts Federal regulations 49 CFR parts 390 to 397, with exceptions.

Comparison with Rules in Adjacent States: All adjacent states (Michigan, Minnesota, Illinois, and Iowa) adopt the same Federal regulations.

Summary of factual data and analytical methodologies used and how the related findings support the regulatory approach chosen: The Federal Motor Carrier Safety Administration did extensive research into the most recent changes to the rules regulating commercial motor carriers and commercial drivers. Its research, coupled with input from the motor carrier industry, resulted in the recently revised regulations for interstate and intrastate commerce effective April 1, 2006.

Analysis and supporting documentation used to determine effect on small businesses: The research provided by the Federal Motor Carrier Safety Administration was used in analyzing the effects on small business.

Effect on small business: This rule will have minimal adverse impact on small businesses. The Department's Regulatory Review Coordinator may be contacted by e-mail at andrew.ruiz@dot.state.wi.us, or by calling (414) 438-4585.

Fiscal effect and anticipated costs incurred by private sector: The Department estimates that there will be no fiscal impact on the liabilities or revenues of any county, city, village, town, school district, vocational, technical and adult education district or sewerage district. The Department estimates that there will no fiscal impact on state revenues or liabilities, and minimal impact on the private sector.

Agency contact person and copies of proposed rule: Copies of the proposed rule can be obtained, without cost, by writing to Capt. Chuck Teasdale, Department of Transportation, Division of State Patrol, Room 551, P. O. Box 7936, Madison, WI 53707-7936. You may also contact Capt. Teasdale by phone at (608) 266-0305.

PART 2

TEXT OF PROPOSED RULE

SECTION 1. Trans 327.01(2)(b) and (c) are repealed.

SECTION 2. Trans 327.01(2)(d) is renumbered Trans 327.01(2)(b).

SECTION 3. Trans 327.01(2)(e) to (h) are repealed.

SECTION 4. Trans 327.03(intro.) is amended to read:

Trans 327.03 Federal regulations adopted. (intro.) The following federal motor carrier safety regulations adopted by the United States department of transportation and in effect on ~~January 4, 2004~~ October 1, 2006, are adopted by the department and shall be enforced in relation to those carriers, drivers or vehicles which operate in intrastate commerce in the same manner as though the regulations were set out in full in this chapter:

SECTION 5. Trans 327.03(2) and (7) are amended to read:

Trans 327.03(2)(a) Title 49, Code of Federal Regulations, part 391, qualifications of drivers, except:

1. 391.11(b)(1) and 391.41(b)(3), if in the alternative a driver with diabetes controlled by insulin obtains statements from 2 physicians indicating on a form provided by the department of transportation that the diabetes is not likely to cause loss of ability to control or operate a commercial motor vehicle.

2. 391.41(b)(10), if a driver who does not meet the vision standards provides documentation from a licensed vision specialist that he or she does not have progressive eye disease; that his or her vision in the best eye, corrected or uncorrected, is at least 20/40 (Snellen); and that he or she has a minimum of 70-degree visual field from the center of at least one eye. The documentation shall be accompanied by a statement from the specialist indicating that the driver's vision is not likely to cause a loss of ability to control or operate a commercial motor vehicle. A driver may apply for an exception or waiver to drive in intrastate commerce by submitting this information with his or her application.

(b) A driver is not eligible for an exception or waiver under par. (a) if he or she has had any moving violations or any reportable at-fault accidents while driving any motor vehicle within the 3-year period prior to the date of the application. After a driver receives an exception or waiver, his or her noncompliance with any applicable reporting requirements may result in cancellation of the exception or waiver.

(7) Every traffic officer and state patrol inspector employed under the authority of s. 110.07, Stats., is authorized to declare vehicles and drivers out-of-service in accordance with the ~~2003~~ 2006 North American uniform out-of-service criteria.

SECTION 6. Trans 327.03(10) is created to read:

Trans 327.03(10) Title 49, Code of Federal Regulations, part 395, hours of service of drivers, except 395.1(e)(1), 395.1(h), 395.1(i), 395.5, 395.8, and the maximum number of hours identified in 395.3 is adopted as follows:

(a) More than 12 hours following 10 consecutive hours off duty.

(b) For any period after having been on duty 16 hours following 10 consecutive hours off duty.

(c) After having been on duty for 70 hours in any period of 7 consecutive days.

(d) After having been on duty for 80 hours in any period of 8 consecutive days.

SECTION 7. Trans 327.05(3) and (4) are repealed.

SECTION 8. Trans 327.05(5) and (6) are renumbered Trans 327.05(3) and (4) and Trans 327.05(4)(b)1. and 2., as renumbered, are amended to read:

Trans 327.05(4)(b)1. No driver shall drive after being on duty in excess of the maximum periods permitted by ~~sub. (3)~~ s. Trans 327.03(10).

2. No driver required to maintain a record of duty status under sub. ~~(5)~~ (3) shall fail to have a true and accurate record of duty status current on the day of examination and for the prior 7 consecutive days.

SECTION 9. Trans 327.07(2) is amended to read:

Trans 327.07(2) The provisions of ss. Trans 327.03(2), (3) ~~and (6)~~ and (10), and 327.05 shall be enforced under the provisions of ss. 194.38 and 194.43, Stats.

SECTION 10. Trans 327.09(5)(intro.), (b) and (c) are amended to read:

Trans 327.09(5)(intro.) The provisions of s. Trans 327.05~~(5)~~(3) do not apply to drivers of vehicles operating within an area having a 150 air mile radius from the drivers' home post office or a 150 air mile radius from the official worksite of the vehicle if:

(b) At least 8 10 consecutive hours off duty separate each 12 hours on duty.

(c) The driver does not exceed 12 hours maximum driving time following 8 10 consecutive hours off duty.

SECTION 11. Trans 327.09(6) to (12) are repealed.

SECTION 12. Trans 327.09(13) is renumbered Trans 327.09(6) and, as renumbered, Trans 327.09(6)(a) is amended to read:

Trans 327.09(6)(a) The provisions of ss. Trans 327.03(2) and 327.05 do not apply to drivers of motor vehicles when transporting property or passengers during a declared emergency as defined in s. Trans 327.01(2)(~~d~~)(b). Each employer must declare and document that the emergency is necessary to assure the protection of public health and safety or to provide other essential assistance to the public. Each employer shall maintain such documentation for one year and shall make it available upon request of a traffic officer or state patrol inspector. Each employer shall also notify the Wisconsin department of transportation, division of state patrol of such declarations by fax or first class mail within 30 days or by the end of the calendar year, whichever is greater.


SECTION 13. Trans 327.09(7) is created to read:

Trans 327.09(7) The provisions of this chapter do not apply to any farm truck or dual purpose farm truck combined with any semitrailer or farm trailer, or any vehicle combined with a horse trailer, if the vehicle combination's gross combination weight rating, registered weight, and actual gross weight do not exceed 26,000 pounds, the vehicle combination does not include a commercial motor vehicle described in s. 340.01 (8)(c) or (d), Stats., and the vehicle combination is operated solely in intrastate commerce.

(END OF RULE TEXT)

Effective Date. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

Signed at Madison, Wisconsin, this 14th day of June, 2006.


FRANK J. BISALACCHI
Secretary
Wisconsin Department of Transportation



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

Ronald Sklansky
Clearinghouse Director

Richard Sweet
Clearinghouse Assistant Director

Terry C. Anderson
Legislative Council Director

Laura D. Rose
Legislative Council Deputy Director

PART 3 CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE **06-043**

AN ORDER to repeal Trans 327.01 (2) (b) and (c), and (e) to (h), 327.05 (3) and (4), and 327.09 (6) to (12); to renumber Trans 327.01 (2) (d), 327.05 (5) and (6), and 327.09 (13); to amend Trans 327.03 (intro.), (2), and (7), 327.07 (2) and 327.09 (5) (b) and (c); and to create⁴ Trans 327.03 (10) and 327.09 (7), relating to motor carrier safety.

Submitted by **DEPARTMENT OF TRANSPORTATION**

04-24-2006 RECEIVED BY LEGISLATIVE COUNCIL.

05-17-2006 REPORT SENT TO AGENCY.

RS:DLS

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES ☐ NO ☒

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES ☒ NO ☐

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES ☐ NO ☒

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached YES ☐ NO ☒

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES ☒ NO ☐

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES ☐ NO ☒

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES ☐ NO ☒



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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Clearinghouse Director

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Legislative Council Deputy Director

CLEARINGHOUSE RULE 06-043

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated January 2005.]

2. Form, Style and Placement in Administrative Code

a. The preface to the rule notes the following with respect to the rule’s effect on small business: “All businesses will have the same effect. There is no differentiation between small business and large business.” The fact that there may be no differentiation is not relevant to the analysis. Sections 227.114 and 227.14 (2) (a) 6., Stats., are intended to direct an agency to consider a rule’s impact on small business and, if possible, to consider methods by which that impact may be lessened. This policy applies regardless of whether businesses that are not small businesses are similarly affected.

b. In the treatment clause in SECTION 13, “Trans 327.06(a)” should be “Trans 327.09 (6) (a).”

c. The treatment clauses of SECTIONS 8 and 9 should be combined as follows:

SECTION 8. Trans 327.05 (5) and (6) are renumbered Trans 327.05 (3) and (4) and Trans 327.05 (4) (b) 1. and 2., as renumbered, are amended to read:

Also, for proper drafting form, in the text in SECTION 8, at the beginning of the amended “(b) 2.”, delete the “(b).”

5. Clarity, Grammar, Punctuation and Use of Plain Language

The additional language in s. Trans 327.03 (2) is not as clear as it could be. One possible format for redrafting is as follows:

Trans 327.03 (2) (a) Title 49, Code of Federal Regulations, Part 391, qualifications of drivers, except:

1. 391.11 (b) (1), and 391.41 (b) (3) if...likely to cause a loss of ability to control or operate a commercial motor vehicle.

2. 391.41 (b) (10), if a driver who does not meet the vision standards provides documentation from a licensed vision specialist that he or she does not have progressive eye disease; that his or her vision in the best eye, corrected or uncorrected, is at least 20/40 (Snellen); and that he or she has a minimum of 70-degree visual field from the center of at least one eye. The documentation must be accompanied by a statement from the specialist indicating that the driver's vision is not likely to cause a loss of ability to control or operate a commercial motor vehicle. A driver may apply for an exception or waiver to drive in intrastate commerce by submitting this information with his or her application.

(b) A driver is not eligible for an exception or waiver under par. (a) if he or she has had any (accidents or moving violations) (NOTE: **specify what types of accidents or moving violations—accidents or moving violations while driving commercial motor vehicles, other types of motor vehicles, or both?**) within the 3 year-period prior to the date of the application. After a driver receives an exception or waiver, his or her noncompliance with any applicable reporting requirements may result in cancellation of the exception or waiver.

This is **just an example** of how this provision can be redrafted for clarity and meaning. The department should review and, if necessary, revise this language to make sure that it is in full accordance with the intent of the department in light of the federal regulations.

PART 4
CR 06-043

ANALYSIS OF FINAL DRAFT OF TRANS 327

(a) **Basis and Purpose of Rule**. This rule making will amend ch. Trans 327, relating to intrastate motor carrier safety regulations, to bring it into compliance with the most recent changes to the Federal Motor Carrier Safety Regulations which went into effect on April 1, 2006. Amendment of this rule will assure State Patrol inspectors and troopers are enforcing the most recent Federal Motor Carrier Safety regulations for intrastate carriers. The update of this rule will also keep the Department in compliance to qualify for continued Motor Carrier Safety Assistance Program (MCSAP) funding.

(b) **Modifications as a Result of Testimony at Public Hearing**. The public hearing was held in Madison on May 26, 2006. There were no significant modifications made to the proposed rule as a result of the public hearing.

(c) **List of Persons who Appeared or Registered at Public Hearing**. The following persons appeared registered at the hearing:

Tom Howells, President, Wisconsin Motor Carriers Association, P. O. Box 44849, Madison, WI 53744-4849—spoke in favor and for information.

Michael DeHaan, Wisconsin Motor Carriers Association, P. O. Box 44849, Madison, WI 53744-4849—spoke in favor and for information.

Pat Stevens, Executive Director, Wisconsin Transportation Builders Association, One South Pinckney Street, Suite 818, Madison, WI 53551—spoke for information.

David L. Palubicki, Compliance Manager, Payne and Dolan, Inc., Zenith Tech, Inc., 143 W. 23650 Badinger Road, Waukesha, WI 53187—spoke for information.

Rick Nesbit, Safety Manager, Wingra Stone Company/Wingra Redi-Mix, Inc., P. O. Box 44284, Madison, WI 53744-4284—spoke for information.

Blake Moschel, Manager, Mathy Construction, 920 10th Avenue North, Onalaska, WI 54650—registered for information.

Gregory G. Stahl, Dispatcher, Dorner Stahl Trucking, E506 Luxemburg Road, Luxemburg, WI 53217—registered for information.

Glenn Hewitt, Logistics Manager, Northeast Asphalt Inc., W6380 Design Drive, Greenville, WI 54942—registered in favor of the rule.

R. B. Willder, Loss Control Director, Wisconsin Agri-Service Association, 6000 Gisholt Drive, Suite 208, Madison, WI 53713—registered for information.

(d) Summary of Public Comments and Agency Response to those Comments: Written comments were received from:

Tom Howells, Wisconsin Motor Carriers Association—Mr. Howells provided five recommendations regarding the proposed rule. First, Mr. Howells suggested that the Department broaden the application of the variance allowed under federal regulation by exempting commercial motor vehicles with a GVW, GVWR, GCW or GCWR of 26,000 pounds or less. This would allow the Department to better focus its limited resources. Second, Mr. Howells suggested that the Department consult with the Federal Motor Carrier Safety Administration to confirm that the change in off-duty hours from 8 to 10 hours is required to meet the tolerance guidelines for compatibility under federal regulation. Third, Mr. Howells suggested that the proposed rule adopt the expanded definition of "agricultural commodity" identified in the most recent reauthorization bill thereby exempting transporters of milk and milk products from the maximum hours of service. Next, Mr. Howells suggested that a summary of Part 395 be developed and included in an addendum or appendix to the rule. Finally, Mr. Howells requested an extension to the time period for submitting written comments. Mr. Howells also disagreed with the Department's claim that the proposed rule will have no fiscal impact on the private sector. More specifically, the increase in the driver's required continuous rest period from 8 to 10 hours will likely increase transportation costs during certain periods of the year.

Agency Response: Although the Department agrees that exempting vehicles under 26,000 pounds would provide for a clearer more focused rule, the Federal Motor Carrier Safety Administration holds the State accountable for the crash rate involving vehicles between 10,001 and 26,000 pounds. The only mechanism available for identifying the carriers and vehicles that pose the greatest safety risk is through the regulations adopted by this rule. The Department has consulted with the Federal Motor Carrier Safety Administration and it has been determined that Part 350 does not allow a variance for an eight hour off-duty period. Failure to adopt a 10-hour off-duty period would result in an FMCSA determination that Wisconsin regulations are incompatible with federal regulation. The current rule does adopt the expanded definition of agricultural commodity as identified in the most recent reauthorization bill. Chapter Trans 327 has a long history of adopting federal regulation and the addition of Part 395 should not present a problem. As stated in s. Trans 327.13, a copy of the federal regulations adopted by this administrative code are available by contacting the Division of State Patrol. As a result of Mr. Howells' request, the written comment period was extended by seven days. Although the increase in off-duty time from 8 hours to 10 hours may require a change in some business practices, it may have some fiscal impact.

R. B. Willder, Wisconsin Agri-Service Association, Inc.—The majority of Mr. Willder's comments were seeking clarification to the proposed rule. First, Mr. Willder questioned the significance of the April 1, 2006 date identified in the plain language analysis. Mr. Willder also questioned the fiscal impact of the change to 10 hours off-duty and whether the State has sought a legal interpretation regarding the compatibility of the existing language. Mr. Willder also questioned the language adopting the federal regulations in effect on October 1, 2006. Mr. Willder's comments also sought clarity on the

"agricultural exemption" enacted by the reauthorization bill and questioned how the exemption impacted the proposed rule. Finally, Mr. Willder identified two typos in the proposed rule.

Agency Response: The Department intends to adopt the most current federal regulations and therefore included the October 1, 2006 regulations in the proposed rule. The April date discussed in the plain language analysis pertains to specific changes to the federal regulations. Failure to adopt a 10-hour off-duty period would result in an FMCSA determination that Wisconsin regulations are incompatible with federal regulation. As stated above, the proposed rule will adopt the expanded definition of "agricultural commodity" identified in SAFETEA-LU reauthorization bill. The typos identified by Mr. Willder have been corrected.

Wayne P. Kokta, Transportation Manager, Dawes Rigging & Crane Rental, Inc., Milwaukee, WI (via e-mail)--Mr. Kokta requested an exemption from the hours of service regulations for crane operators.

Agency Response: Federal regulation (Part 350.343) prevents this type of exemption unless the state submits documentation to the Federal Motor Carrier Safety Administration containing information supporting evaluation in 10 specific factors. The Department does not feel the exemption is warranted or in the best interest of highway safety.

Patrick Stevens, Wisconsin Transportation Builders Association--Mr. Stevens provided comments in three specific areas. First, Mr. Stevens expressed a general concern with the Department's approach to adopting federal regulations by reference. It states that this approach makes it difficult for the regulated community to read and understand. Second, Mr. Stevens expressed concern regarding the definition of "transportation of construction materials and equipment." More specifically, Mr. Stevens requested that the term "normal work reporting location" be more clearly defined. Finally, Mr. Stevens expressed concern with the transition to 10-hours off-duty and suggested that FMCSA be consulted as to the compatibility requirements under Part 350.341(e).

Agency Response: The Department has a long history of adopting federal regulations by adoption and this is a standard practice throughout the nation. As stated above, a copy of the federal regulations adopted by this administrative code are available by contacting the Division of State Patrol. Secondly, the proposed rule does not change the definition of "transportation of construction materials and equipment." Although the definition will be incorporated by reference, the definition remains unchanged and the guidance regarding the "normal work reporting location" will be interpreted in the same manner as it is today. As previously stated, FMCSA has been consulted with regards to the variance issue and Part 350.341 does not currently allow for a variance on off-duty time.

Patrick Essie, Wisconsin Ready Mixed Concrete Association--Mr. Essie requested that the Department delay the implementation of the revised hours of service until October 2008 as mandated by 49 CFR 350.335(b).

Agency Response: Part 350.335 requires the state to adopt compatible regulations "as soon as practical after the effective date of any newly enacted regulation...but no later than three year after that date..." The Department recognizes the positive impact this change will have and believes it to be in the best interest of highway safety. Delaying the implementation would lead to inconsistency and only delay the inevitable.

Tim Clay, Wisconsin Federation of Cooperatives (via e-mail)--Mr. Clay expressed concern regarding the adoption of the additional hours of service exemptions granted under the SAFETEA-LU reauthorization bill. More specifically, the agricultural exemption and the utility service exemption. Mr. Clay also expressed concern regarding the fiscal estimate of transitioning from 8 to 10 consecutive hours. Additionally, Mr. Clay questioned whether the proposed transition is a result of a state-demonstrated safety shortfall or just necessary to maintain current MCSAP funding.

Agency Response: As stated above, the proposed rule will include the adoption of the hours of service exemptions identified in SAFETEA-LU.

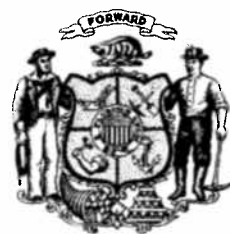
(e) **Explanation of any Changes Made to the Plain Language Analysis or Fiscal Estimate:** A change was made to the fiscal estimate to reflect some impact to the private sector.

(f) **Response to Legislative Council Recommendations.** The Legislative Council report contained a number of recommendations, all of which have been addressed.

(g) **Final Regulatory Flexibility Analysis.** This rule will have some adverse impact on small businesses.



WISCONSIN STATE LEGISLATURE



PUBLIC HEARING – PROPOSED AMENDMENTS TO TRANS 327
INTRASTATE MOTOR CARRIER SAFETY REGULATIONS
May 26, 2006, Hill Farms State Office Bldg., Madison, WI

COMMENTS OF THE WISCONSIN MOTOR CARRIERS ASSOCIATION

The Wisconsin Motor Carriers Association (WMCA) is located at 562 Grand Canyon Drive, Madison, Wisconsin. The WMCA is a non-profit trade association representing the interests of 1,260 for hire and private truck operators and includes the Wisconsin Milk Haulers Association, the Wisconsin Movers Association, the Wisconsin Motor Coach Association and the Wisconsin Towing Association.

We think our industry has made a commendable effort to improve truck safety on Wisconsin's highways since the Department adopted portions of the Federal Motor Carrier Safety Regulations in 1987 with the creation of Trans 327. We have been a willing partner with both the Department and the Federal Motor Carrier Safety Administration in a continuous process of educating truckers about safety regulations and supporting efforts of enforcement to insure compliance. We believe the result of these efforts between our industry and the motor carrier enforcement agencies has been safer Wisconsin highways for all users.

The WMCA supports the Motor Carrier Safety Assistance Program (MCSAP) and realizes its importance in ensuring the enforcement of truck safety regulations as set out in Wisconsin Administrative Rule Chapter Trans 327. We also realize the continued Federal funding of MCSAP is contingent on the State's compliance with the provisions of 49 CFR Part 350 – *Commercial Motor Carrier Safety Assistance Program* relative to the compatibility of the rules set out in Trans 327 as applied to intrastate commerce with the Federal Motor Carrier Safety Regulations (FMCSRs). However the Federal government allows certain deviations from the FMCSRs as applied to intrastate commerce and Wisconsin has for the most part incorporated these variances into Trans 327. This provides that the rules are appropriately balanced between what is necessary to insure that trucks are operated safely and what is needed to allow motor carriers to go about the business of providing the transportation needs of Wisconsin's economy. We caution the Department when considering changes to Trans 327 that the final result will maintain this important balance.

We do have some recommendations regarding the proposed rule:

- We would suggest that the Department broaden its application of the variance at 350.41(a) to exempt commercial motor vehicles (CMVs) with a GVW, GVWR, GCW or GCWR of 26,000 pounds or less from all of the provisions of the FMCSRs when operated in intrastate commerce. We believe the Department's enforcement focus and resources to insure safe operation of trucks should be applied based on the definition of CMV as set out in Wisconsin s. 340.01(8). Vehicles weighing less than 26,001 pounds used for commercial purposes are currently exempt from much of Trans 327 and there are other state statutes and rules that can adequately insure their safe operation.
- We note that the continuous rest period required after driving 12 hours and being on duty 16 hours has been increased from 8 to 10 hours. We understand that the specific variances for the hours of service at 49 CFR 350.41(e) do not include reference to the continuous rest period requirement and without such reference, it could be assumed that rest period must be increased to 10 hours to achieve compatibility with the current provisions of the FMCSRs. We would ask that the Department consult with the Federal Motor Carrier Safety Administration to confirm that

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this change is absolutely required to meet the tolerance guidelines for compatibility, and if it isn't, we ask that the continuous rest period remain at 8 hours.

- The proposed rule has deleted the exemption for maximum hours of service for drivers transporting agricultural commodities at 327.09 (8) and in lieu thereof adopted 395.1(k) -- Agricultural operations. We would request that the term "agricultural commodities" be defined as to be consistent with the definition of "agricultural commodities" as defined in Wisconsin statute 96.01(3).

(3) "Agricultural commodity" means any agricultural, horticultural (excepting floricultural), viticultural, vegetable, poultry, and livestock products produced in this state, including milk and milk products, bees and honey, or any class, variety or utilization thereof, either in their natural state or as processed by a producer for the purpose of marketing such product or by a processor, but not including timber and wood products.

Although current regulatory guidance of the FMCSRs does not provide for "milk and milk products" to be defined as "agricultural commodities" the recent enactment of *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users' (SAFETEA-LU)* by Congress provides as follows:

SEC. 4130. OPERATORS OF VEHICLES TRANSPORTING AGRICULTURAL COMMODITIES AND FARM SUPPLIES.

(a) *Agricultural Exemption-* Section 229(a)(1) of the Federal Motor Carrier Safety Improvement Act of 1999 (as added by section 4115 of this Act), is amended to read as follows:

'(1) TRANSPORTATION OF AGRICULTURAL COMMODITIES AND FARM SUPPLIES- Regulations prescribed by the Secretary under sections 31136 and 31502 regarding maximum driving and on-duty time for drivers used by motor carriers shall not apply during planting and harvest periods, as determined by each State, to drivers transporting agricultural commodities or farm supplies for agricultural purposes in a State if such transportation is limited to an area within a 100 air mile radius from the source of the commodities or the distribution point for the farm supplies.'

(b) *Review by the Secretary-* Section 229(c) of such Act is amended by striking 'paragraph (2)' and inserting 'paragraph (1), (2), or (4)'.

(c) *Definitions-* Section 229(e) of such Act is amended by adding at the end the following:

'(7) AGRICULTURAL COMMODITY- The term 'agricultural commodity' means any agricultural commodity, non-processed food, (emphasis added) feed, fiber, or livestock (including livestock as defined in section 602 of the Emergency Livestock Feed Assistance Act of 1988 (7 U.S.C. 1471) and insects).

'(8) FARM SUPPLIES FOR AGRICULTURAL PURPOSES- The term 'farm supplies for agricultural purposes' means products directly related to the growing or harvesting of agricultural commodities during the planting and harvesting seasons within each State, as determined by the State, and livestock feed at any time of the year.'

Given the expanded definition of "agricultural commodity" we believe Trans 327 either in the text of the rule or by reference of 395.1(k) should reflect that transporters of milk and milk products are subject to this exemption from maximum hours of service and further, the condition relating to the duration of harvest season be should be increased to 12 months specifically for milk and milk products.

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This provision would provide for much needed regulatory relief for transporters of milk in bulk, in tank trucks, as nearly a third of their drivers' on duty time is dedicated to the sampling, loading and unloading of their product. This circumstance results in difficulty in the timely pick up and delivery of a highly perishable product.

- Of some concern is the adoption of a large portion of 49 CFR 395 into Trans 327 without the benefit of it being included into the text of the rule. Prior to this proposed rule, Part 395 was not incorporated by reference, but only certain provisions included in the text at Trans 327.05. This allowed one to review all that applied relative to hours of service of drivers in the text of the rule. We would ask that that some sort of summary as to the provisions adopted from Part 395 be noted in an addendum or appendix to the rule. We feel this would do much to assist truck operators who do not operate in interstate commerce understand and comply with the hours of service regulations.
- We would respectfully request that the Department grant a reasonable time period after the public hearing to submit additional written comments on the proposed changes to Trans 327.

We do not agree with the Department's claim that the proposed rule will have no fiscal impact on the private sector. The increase in the driver's required continuous rest period from 8 to 10 hours will likely increase transportation costs during certain periods of the year. Currently, businesses that use ~~commercial motor vehicles~~ are experiencing significant increases in the costs of fuel and insurance along with a shortage of drivers. We hope the Department is cognizant of these economic factors as they may impact productivity and take them into consideration as they propose changes to Trans 327.

The Wisconsin Motor Carriers Association and its Divisions will continue to work with the Department to improve truck safety in Wisconsin and hope they will give thoughtful consideration to our recommendations.

Respectfully submitted,

Thomas A. Howells
President



Phillips, Matt

From: Erin Longmire [elongmire@ekgmail.com]
Sent: Friday, July 28, 2006 2:52 PM
To: Phillips, Matt
Subject: RE: CHR 06-043

Hello Matt –

I have included a recent National Ready Mixed Concrete Association (NRMCA) newsletter article concerning the federal court case relating to hours of service. Apparently, there were two separate challenges to the rule, which have been consolidated into one. The group is challenging the rule in its entirety and would affect both the sleeper-berth and 10 hour off-duty provisions.

The timeline of the federal challenge is also stated in the newsletter article. The federal court of appeals expects to issue its decision early 2007. If the state of Wisconsin is to adopt the federal rule change as it stands now, and the federal court of appeals overturns the rule as it did last time, the WRMCA's fear is that Wisconsin will have adopted a federal rule that now applies here in Wisconsin, but not on a federal level. This hours of service provision is a fairly large policy change for Wisconsin and the WRMCA would have fought this openly had it been proposed as a change that originated on a state level. It seems that waiting for the federal court of appeals decision in early 2007 would be the most practical way of approaching this policy change in Wisconsin. If all remains the same on a federal level, what's the harm in waiting to find out in early 2007 when the proposed rule isn't scheduled to go into effect until October of 2006?

I would hate to have Wisconsin adopt a federal rule change that would only get overturned through the federal appellate process, and therefore leave Wisconsin with a possible court challenge themselves. The WRMCA would again stress delaying the implementation of this rule change until the federal appellate court rules in 2007.

Please let me know if I can be of any further assistance – I am also happy to meet with the department on this as well if needed.

Thanks again Matt!

Erin

Court Issues Procedural Orders in HOS Lawsuits

The United States Court of Appeals for the District of Columbia has issued procedural orders addressing the current challenges to the hours-of-service (HOS) regulations. On its own motion, the court has consolidated two separate challenges to the rules. The two challenges, filed by Public Citizen and the Owner-Operator Independent Drivers Association (OOIDA), will be considered as one case.

The Public Citizen challenge asked the court to review the final HOS regulations, issued August 25, 2005, by the Federal Motor Carrier Safety Administration (FMCSA). The OOIDA challenge asked the court to review two provisions in the regulation, the 14-hour on-duty rule and the split sleeper-berth rule.

Also, the court denied a request by Public Citizen to have the same panel of judges that heard its 2003 HOS challenge hear the current case.

The court also set a briefing schedule that concludes September 29, 2006. Arguments in the case are expected in October or November with the court's final decision expected in early 2007.

Contact Kevin Voelte, NRMCA Government Relations


08/01/2006

Source: J.J. Keller

From: Phillips, Matt [mailto:Matt.Phillips@legis.state.wi.us]
Sent: Friday, July 28, 2006 12:47 PM
To: Erin Longmire
Subject: CHR 06-043

Erin:

I just wanted to follow-up with you regarding CHR 06-043. We did send a letter to the department requesting a meeting, which extends our timeline until Aug. 16th. In a conversation with Lt. Teasdale of the state patrol, he indicated that the pending court challenges to the federal rule apply only to the sleeper berth provisions in the HOS rule, and will not impact the 10 hour off-duty period. Is this your understanding as well, or is your association aware of an additional challenge?

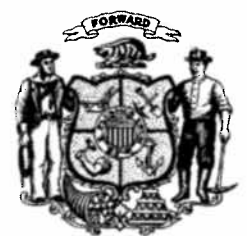


Matt Phillips
Committee Clerk
Committee on Natural Resources and Transportation
Senator Neal Kedzie, Chair
11th Senate District

08/01/2006



WISCONSIN STATE LEGISLATURE



Clearinghouse Rule 06-043

STATE OF WISCONSIN

DEPARTMENT OF TRANSPORTATION

OFFICE OF THE SECRETARY

The Wisconsin Department of Transportation proposes an order to repeal TRANS 327.01(2)(b) and (c), and (e) to (h), 327.05(3) and (4), and 327.09(6) to (12); renumber TRANS 327.01(2)(d), 327.05(5) and (6), and 327.09(13); amend TRANS 327.03(intro.), (2) and (7), 327.07(2), and 327.09(5)(b) and (c); and create TRANS 327.03(10) and 327.09(7), relating to motor carrier safety.

**NOTICE OF HEARING
AND
TEXT OF PROPOSED RULE**

NOTICE IS HEREBY GIVEN that pursuant to 110.07, 110.075, 194.38, 194.43 and 227.11, Stats., and interpreting ss. 110.07 and 110.075, and ch. 194, Stats., the Department of Transportation will hold a public hearing in **Room 551** of the Hill Farms State Transportation Building, 4802 Sheboygan Avenue, Madison, Wisconsin on the **26th** day of **May**, 2006, at **10:00 AM** to consider the amendment of ch. Trans 327, Wisconsin Administrative Code, relating to motor carrier safety.

An interpreter for the hearing impaired will be available on request for this hearing. Please make reservations for a hearing interpreter at least 10 days prior to the hearing.

Parking for persons with disabilities and an accessible entrance are available.

Analysis Prepared by the Wisconsin Department of Transportation

Statutes interpreted: ss. 110.07 and 110.075, and ch. 194, Stats.

Statutory authority: ss. 110.07, 110.075, 194.38, 194.43 and 227.11, Stats.

Explanation of agency authority: The secretary shall set standards and adopt rules to establish a plan of inspection to implement the inspection program. It shall be the duty of the Department to prescribe rules and regulations as to safety and operations and

the hours of service of drivers of motor vehicles operated under the authority of this chapter.

Related statute or rule: ss. 110.07, Stats.

Plain language analysis: This rule making will amend ch. Trans 327, relating to intrastate motor carrier safety regulations, to bring it into compliance with the most recent changes to the Federal Motor Carrier Safety Regulations which went into effect on April 1, 2006. Amendment of this rule will assure State Patrol inspectors and troopers are enforcing the most recent Federal Motor Carrier Safety regulations for intrastate carriers. The update of this rule will also keep the Department in compliance to qualify for continued Motor Carrier Safety Assistance Program (MCSAP) funding.

The Department annually updates ch. Trans 327 to keep current with the most recent changes to 49 CFR parts 390, 391, 392, 393, 395, 396 and 397.

Summary of, and preliminary comparison with, existing or proposed federal regulation: Trans 327 (Motor Carrier Safety) adopts Federal regulations 49 CFR parts 390 to 397, with exceptions.

Comparison with Rules in Adjacent States: All adjacent states (Michigan, Minnesota, Illinois, and Iowa) adopt the same Federal regulations.

Summary of factual data and analytical methodologies used and how the related findings support the regulatory approach chosen: The Federal Motor Carrier Safety Administration did extensive research into the most recent changes to the rules regulating commercial motor carriers and commercial drivers. Its research, coupled with input from the motor carrier industry, resulted in the recently revised regulations for interstate and intrastate commerce effective April 1, 2006.

Analysis and supporting documentation used to determine effect on small businesses: The research provided by the Federal Motor Carrier Safety Administration was used in analyzing the effects on small business.

Effect on small business: All businesses will have the same effect. There is no differentiation between small business and large business. The Department's Regulatory Review Coordinator may be contacted by e-mail at andrew.ruiz@dot.state.wi.us, or by calling (414) 438-4585.

Fiscal effect and anticipated costs incurred by private sector: The Department estimates that there will be no fiscal impact on the liabilities or revenues of any county, city, village, town, school district, vocational, technical and adult education district or sewerage district. The Department estimates that there will be no fiscal impact on state revenues or liabilities or on the private sector.

Agency contact person and place where comments are to be submitted and deadline for submission: The public record on this proposed rule making will be held

open until close of business the day of the hearing, 2006, to permit the submission of comments in lieu of public hearing testimony or comments supplementing testimony offered at the hearing. Any such comments should be submitted to Capt. Chuck Teasdale, Department of Transportation, Division of State Patrol, Room 551, P. O. Box 7936, Madison, WI 53707-7936. You may also contact Capt. Teasdale by phone at (608) 266-0305.

To view the proposed amendments to the rule, view the current rule, and submit written comments via e-mail/internet, you may visit the following website: <http://www.dot.wisconsin.gov/library/research/law/rulenotices.htm>.

TEXT OF PROPOSED RULE

SECTION 1. Trans 327.01(2)(b) and (c) are repealed.

SECTION 2. Trans 327.01(2)(d) is renumbered Trans 327.01(2)(b).

SECTION 3. Trans 327.01(2)(e) to (h) are repealed.

SECTION 4. Trans 327.03(intro.) is amended to read:

Trans 327.03 Federal regulations adopted. (intro.) The following federal motor carrier safety regulations adopted by the United States department of transportation and in effect on ~~January 4, 2004~~~~January 4, 2004~~ October 1, 2006, are adopted by the department and shall be enforced in relation to those carriers, drivers or vehicles which operate in intrastate commerce in the same manner as though the regulations were set out in full in this chapter:

SECTION 5. Trans 327.03(2) and (7) are amended to read:

Trans 327.03(2) Title 49, Code of Federal Regulations, part 391, qualifications of drivers except 391.11(b)(1) and 391.41(b)(3), if in the alternative a driver with diabetes controlled by insulin obtains statements from 2 physicians indicating on a form provided by the department of transportation that the diabetes is not likely to cause loss of ability to control or operate a commercial motor vehicle; and 391.41(b)(10) if a driver who does not meet the vision standards can provide documentation from a licensed vision

specialist that they have no progressive eye disease, that the vision in the best eye, corrected or uncorrected, is at least 20/40 (Snellen) and has a minimum of 70-degree visual field from the center of at least one eye along with statement indicating that the vision is not likely to cause a loss of ability to control or operate a commercial motor vehicle, these drivers may apply with the department for an exception/waiver to drive intrastate commerce by submitting the above information along with an application. The driver will not qualify if there are any accidents or moving violations within the 3 years prior to applying. Applicable reporting requirements apply after issuance and can result in cancellation of the exception/waiver.

(7) Every traffic officer and state patrol inspector employed under the authority of s. 110.07, Stats., is authorized to declare vehicles and drivers out-of-service in accordance with the ~~2003~~ 2003-2006 North American uniform out-of-service criteria.

SECTION 6. Trans 327.03(10) is created to read:

Trans 327.03(10) Title 49, Code of Federal Regulations, part 395, hours of service of drivers, except 395.1(e)(1), 395.1(h), 395.1(i), 395.5, 395.8, and the maximum number of hours identified in 395.3 are changed to read as follows:

(a) More than 12 hours following 10 consecutive hours off duty.

(b) For any period after having been on duty 16 hours following 10 consecutive hours off duty.

(c) After having been on duty for 70 hours in any period of 7 consecutive days.

(d) After having been on duty for 80 hours in any period of 8 consecutive days.

SECTION 7. Trans 327.05(3) and (4) are repealed.

SECTION 8. Trans 327.05(5) and (6) are renumbered Trans 327.05(3) and (4).

SECTION 9. Trans 327.05(4)(b)1. and 2., as renumbered, are amended to read:

Trans 327.05(4)(b)1. No driver shall drive after being on duty in excess of the maximum periods permitted by ~~sub. (3)~~ s. Trans 327.03(10).

(b)2. No driver required to maintain a record of duty status under sub. ~~(5)~~ (3) shall fail to have a true and accurate record of duty status current on the day of examination and for the prior 7 consecutive days.

SECTION 10. Trans 327.07(2) is amended to read:

Trans 327.07(2) The provisions of ss. Trans 327.03(2), (3) ~~and~~, (6) and (10), and 327.05 shall be enforced under the provisions of ss. 194.38 and 194.43, Stats.

SECTION 11. Trans 327.09(5)(b) and (c) are amended to read:

Trans 327.09(5)(b) At least 8 10 consecutive hours off duty separate each 12 hours on duty.

(c) The driver does not exceed 12 hours maximum driving time following 8 10 consecutive hours off duty.

SECTION 12. Trans 327.09(6) to (12) are repealed.

SECTION 13. Trans 327.09(13) is renumbered Trans 327.09(6) and, as renumbered, Trans 327.06(a) is amended to read:

Trans 327.09(6)(a) The provisions of ss. Trans 327.03(2) and 327.05 do not apply to drivers of motor vehicles when transporting property or passengers during a declared emergency as defined in s. Trans 327.01(2) ~~(b)~~ (d). Each employer must declare and document that the emergency is necessary to assure the protection of public health and safety or to provide other essential assistance to the public. Each employer shall maintain such documentation for one year and shall make it available upon request of a traffic officer or state patrol inspector. Each employer shall also notify the Wisconsin department of transportation, division of state patrol of such declarations

by fax or first class mail within 30 days or by the end of the calendar year, whichever is greater.

SECTION 14. Trans 327.09(7) is created to read:

Trans 327.09(7) The provisions of this chapter do not apply to any farm truck or dual purpose farm truck combined with any semitrailer or farm trailer, or any vehicle combined with a horse trailer, if the vehicle combination's gross combination weight rating, registered weight, and actual gross weight do not exceed 26,000 pounds, the vehicle combination does not include a commercial motor vehicle described in s. 340.01 (8)(c) or (d), Stats., and the vehicle combination is operated solely in intrastate commerce.

(END OF RULE TEXT)

Effective Date. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

Signed at Madison, Wisconsin, this ____ day of April, 2006.

FRANK J. BUSALACCHI
Secretary
Wisconsin Department of Transportation





Federal Register

Thursday,
August 25, 2005

Part II

Department of Transportation

Federal Motor Carrier Safety
Administration

49 CFR Parts 385, 390, and 395
Hours of Service of Drivers; Final Rule

(96.3 percent) were considered over-the-road. In contrast, of the private motor carriers surveyed, a slight majority (57.6 percent) were considered local. Additionally, the majority of motor carriers surveyed were classified as a truckload (92.6 percent) [FMCSA Field Survey Report (2005), p.4].

Research & Literature Review

As described earlier in Section D, the Agency initiated an extensive review of scientific literature and research in developing this rule, which included the use of subject matter experts to assist in the effort.

The Agency found general consensus within the research that cumulative wakeful hours have a direct correlation with a person's alertness and ability to maintain performance. Specifically, longer wakeful hours result in alertness and performance degradation. The research conclusions are conflicting, depending upon the type of research conducted, on the specific number of hours after which the degradation in alertness and performance adversely affect a driver's ability to safely operate a CMV.

A 1999 simulator study found only a negligible difference in fatigue between a typical day (morning to evening) shift of 10- or 12-hour duty day and a 14-hour day. This same study found that "a daytime work schedule of 14-hours on-duty with a 10-hour off-duty period for a 5-day week did not appear to produce cumulative fatigue" [O'Neill, T.R., *et al.* (1999), pp. 37-41].

A more recent study (2000) of New Zealand CMV drivers found "0.05% BAC (Blood Alcohol Content) equivalence occurred at between 17 and 19 hours of sleep deprivation for most tests. This means that after around 17 hours of wakefulness, a person's performance capacity is sufficiently impaired to a level of concern for safety" [Williamson, A.M., *et al.* (2000), pp. 43-44]. Another study of 48 healthy adults under standardized laboratory conditions found the critical wake period beyond which performance began to lapse was statistically estimated to be about 16 hours [Van Dongen, H.P.A., *et al.* (2003), p. 125]. These findings are generally consistent with comments by Alertness Solutions, which emphasized the importance of continuous wakefulness as a predictor of fatigue [Alertness Solutions, (2005) NPRM Docket comments].

The role of continuous wakefulness is important in predicting fatigue, and thereby protecting driver safety and consequently public safety. Therefore, a duty period provision to control driver work hours is an important component

of the HOS regulatory scheme. There is a consensus among researchers that a schedule that promotes a 24-hour clock is beneficial in creating regularity of work/sleep schedules. Researchers also agree that individuals need 7-8 consecutive hours of sleep per day. The 14-hour duty tour along with a 10-hour off-duty period meets both of these universally accepted findings. This final rule promotes movement toward a 24-hour clock and provides all drivers with the opportunity to obtain 7-8 consecutive hours of sleep per day.

Driver Health Impact

As discussed earlier, an FMCSA driver health team, despite extensive efforts, found little research to evaluate the specific impact or association between the specific hours driven or worked and CMV driver health. One can conclude, based upon the research, that sleep, along with hours worked, plays a role in a person's overall health.

If long work hours adversely affect driver health "which current research does not clearly indicate" the 14-hour limit will protect drivers better than the pre-2003 rule. Drivers ordinarily are not allowed to extend their duty tour beyond 14 hours. The 14-hour provision is a substantial improvement over the pre-2003 rule, with its 15-hour limit extendable by the amount of off-duty time taken during the duty tour, because this provision generally reduces daily work hours and any associated health effects. However, drivers operating under the new short-haul rule (described in section J.10) are allowed to drive up to the end of the 16th hour twice a week. There is no evidence that this short-haul schedule adversely affects drivers' ability to drive safely, and there is no available information on the health implications of an occasional 16-hour workday.

Conclusion

After thorough consideration of the research studies, crash and operational survey data, and comments to the NPRM, the Agency has decided to prohibit driving after 14 consecutive hours after coming on duty. The Agency believes the information is clear on the need to limit the cumulative hours that a driver may work and continue to drive.

It is the best judgment of the Agency that a 14-hour non-extendable duty tour period, in conjunction with 11 hours driving and 10 hours off duty, will reduce driver fatigue, promote driver health, and improve CMV transportation safety.

J.7. Off-Duty Time

In the NPRM, the Agency requested comments on the extent to which the increase in the minimum off-duty time from 8 hours to 10 hours affected driver health, the safe operation of CMVs, and economic factors in the CMV industry. Of the 452 commenters who discussed the off-duty requirement, 270 (60 percent) approved of increasing off-duty time to 10 hours. For drivers who commented, the level of support was the same; 60 percent of the 366 expressed approval of the increase.

Impacts on Health and Safety

A substantial majority (73 percent) of the comments on the health and safety impacts of the 10-hour break included positive consequences, particularly comments from drivers, but also from carriers.

ATA, National Ready Mixed Concrete Association (NRMCA), National Industrial Transportation League (NITL), the Specialized Carriers and Rigging Association, the California Highway Patrol (CHP), the International Brotherhood of Teamsters, and three carriers said the increase in mandatory off-duty time gives drivers enough time to get 8 hours of sleep as well as to attend to other personal needs. The AFL-CIO, CHP and a carrier said that the 10-hour off-duty requirement, when combined with the consecutive 14-hour on-duty requirement, benefits drivers by putting them on a 24-hour daily schedule. Grammer Industries, Inc. said that the 10-hour off-duty requirement provides its drivers with the ability to exercise, take care of personal hygiene matters, eat meals, and spend time for relaxation. The carrier said that any break over 10 hours makes drivers out on the road "nervous" and causes them stress.

Commenters also pointed out detrimental impacts. Werner Enterprises and two drivers said that the 10-hour period posed problems for over-the-road drivers. Werner explained that because the break must be a full 10 hours, which is often more than a driver needs for sleep and daily personal maintenance, many drivers are frustrated when they wake because they must wait an additional 3 to 4 hours before they can go back on duty. The 10 hours off has little impact on long-haul drivers' personal or family activities because they are generally away from home then.

J.B. Hunt also argued that the change had a negative impact on long-haul drivers. It reported surveying 697 drivers. The survey found that 32 percent indicated that going from 8 to

10 hours off was the "least liked" part of the new 2003 rule. The reason given by many was that they must now begin looking for parking locations by late afternoon or be forced to use ramp areas or other less safe break locations. Because there is no flexibility in requiring 10 consecutive hours of break time, with the limited exception for split-sleeper periods that do not allow drivers to take care of their basic needs, drivers must often try to sleep in less-than-optimal sleeping conditions. Eleven drivers said that 10 hours off-duty is overly restrictive for those drivers who do not need 8 to 10 hours of sleep per night. Over-the-road and team drivers, in particular, found 10 hours too long. Boston Sand and Gravel stated that the rule does not necessarily lead to increased sleep time, based on personal choices of the drivers in their use of off-duty time. Massachusetts Concrete and Aggregate Producers Association, Inc. also argued that 8 hours of rest was sufficient. ABF stated that most of its drivers would have preferred retention of the 8-hour rest period when away from home but liked the 10-hour period at home.

Other commenters recommended a more substantial increase in the required break. NIOSH reiterated its support for a 24-hour work-rest cycle of 12 hours on-duty and 12 hours of free time. They also observed that the 12-on/12-off daily cycle is consistent with common scheduling practices in other industries that use shifts longer than 8 hours. IIHS said that the increase in required daily off-duty time is an important improvement, but it asserted that a 10-hour off-duty requirement still is inadequate for drivers to obtain restorative sleep and attend to other daily requirements. AHAS said that solo drivers should have at least 10 consecutive hours off-duty that are taken in a single block of time, regardless of whether that off-duty rest time is taken in a sleeper berth.

McCormick proposed that any rest period equal to or greater than 10 consecutive hours, within a 24 hour period, be considered the driver's sleep time. Under this approach, rest would be defined as sleep time, unloading delay time, or delays due to equipment breakdown.

Kimberly Clark agreed that valid science supported a 24-hour work-rest cycle. However, it recommended reducing the mandatory break from 10 to 9 hours and allowing for a short nap during the duty day.

Economic Impacts

Those carriers that commented generally said that the 10-hour break has

a negative economic impact on them. One carrier stated that its trucks idle during each rest period, and longer periods reduce motor life and increase fuel costs. In addition, the trucks are less productive. Brandt Truck Lines reported an increase in drivers and vehicles of 15 to 25 percent, depending on schedules and how "tight" the operation was under the old regulations. Similarly, Colorado Ready Mixed Concrete Association stated that for overnight projects and during peak seasons, companies have had to hire additional drivers to comply with this provision of the regulation. However, ABF Freight and another carrier reported minimal impact.

Relatively few drivers commented on the overall economic impact of the 10-hour off-duty period. One driver stated that the incremental increase in the minimum required off-duty period resulted in drivers making less money, as they are usually paid by the mile or trip, and more off-duty time means fewer miles or trips. Another driver said the rule increased frustration because it diminishes a driver's income.

FMCSA Response

After thoroughly evaluating all of the information gathered, FMCSA has decided to require drivers to take a minimum of 10 consecutive hours off duty.

Crash Data

The Agency has reviewed studies related to crash risk based upon the hours off duty and opportunity for sleep. Studies of truck drivers, [Lin, T.D., *et al.* (1993), p. 9; McCart, A.T., *et al.* (1997), p. 63] point specifically to increased crash risk and recollections of increased drowsiness or sleepiness after less than 9 hours off duty. A study by the National Transportation Safety Board [NTSB (1996), p. 37] found the most critical factors in predicting fatigue were the duration of the most recent sleep period prior to the crash, length of time since last sleep period, sleep over the preceding 24 hours, and split-sleep patterns. Drivers in fatigue-related crashes averaged 5.5 hours of sleep in the most recent sleep period prior to the crash (6.9 hours in the last 24 hours), while drivers in non-fatigue-related crashes averaged 8.0 hours of sleep (9.3 hours in the last 24 hours).

Operational Data

As discussed earlier in Section I, industry surveys found that the 2003 rule, with a minimum of 10 consecutive hours off duty, has generally improved driver rest (less fatigued) and encouraged movement toward a 24-hour

work/rest cycle. The Minnesota Trucking Association (MTA) commented that a survey of their members found the 10 hours off has reduced fatigue, by providing more sleep and promoted better health. A study directed by FMCSA with VTTI (See Section H), which began monitoring 82 CMV drivers in May 2004, has found that drivers on average are getting more than an hour more sleep daily under the 2003 rule. This finding is based upon comparisons of the VTTI data collected through May 1, 2005, to findings reported in research studies conducted under the pre-2003 rule.

In addition to the operational data and surveys received from commenters, drivers submitted comments reporting that under the 2003 rule they have more time at home and obtain more rest, resulting in reduced fatigue. The Agency believes that the increased sleep reported through industry surveys, operational data, and commenters can be attributed to the additional 2-hours off-duty time provided by the 2003 rule.

Research & Literature Review

As mentioned, FMCSA has found general consensus among scientific researchers regarding the human physiological need for 7-8 hours of sleep to maintain performance and alertness.

Studies performed in laboratory settings, as well as studies assessing operational situations, have explored the relationship between sleep obtained and subsequent performance [Dinges, D.F., & Kribbs, N.B. (1991), pp. 98-121; Bonnet, M.H., & Arand, D.L. (1995), pp. 908-11; Belenky, G., *et al.* (1994), pp. 127-135; Dinges, D.F., *et al.* (1997), pp. 274-276; Belenky, G.L., *et al.* (1987), pp. 1-15 to 1-17]. These studies generally found poorer performance levels when sleep is restricted. More recent studies [Balkin, T., *et al.* (2000), p. ES-8; Belenky, G., *et al.* (2003), pp. 9-11; and Van Dongen, H.P.A., *et al.* (2003), p. 124] found that even a relatively small reduction in average nighttime sleep duration (*i.e.*, approximately 6 hours of sleep) resulted in measurably decremented performance. Another report [Rosekind, M.R., *et al.* (1997), pp. 7.2-7.5] concluded that "scientific data are clear regarding the human physiological requirement for 8 hours of sleep to maintain performance and alertness." "Therefore, an average individual who obtains 6 hours of sleep could demonstrate significantly degraded waking performance and alertness * * *". In addition, the authors found the effects of sleep loss/deprivation to accrue, and stated,

"* * * data have demonstrated that not only does the sleep loss accumulate but that the negative effects on waking performance and alertness also are cumulative and increase over time."

A past study of 80 over-the-road drivers in the U.S. and Canada, [Wylie, C.D., *et al.* (1996), p. ES-10] found that drivers obtained nearly 2 hours less sleep per principal sleep period than their stated "ideal" (5.2 hours versus 7.2 hours).

In a survey [Abrams, C., *et al.* (1997), pp. 11-12] of 511 medium- and long-distance truck drivers in the United States, the authors found no statistically significant differences in the stated rest needs among various categories of drivers (owner-operator, company driver, regular route, irregular route, solo, or team). On an average day, a driver reported needing an average of 7 hours of sleep.

In 1998, an expert panel [Belenky, G., *et al.* (1998), p. 7] convened to advise the Agency on potential hours-of-service regulations for CMV drivers. The panel reported that "off-duty hours must include enough continuous time off duty so that drivers are able to meet the demands of life beyond their jobs and are also able to obtain sufficient uninterrupted rest." In addition, the panel recognized that "although there is no guarantee that off-duty time will be spent in sleep, sufficient sleep cannot occur unless there is enough time allowed for it." The panel concluded that, "the time allotted for sleep [off-duty time] must be a minimum of 9 [hours]." The observations and recommendations made regarding continuous daily time off duty for CMV drivers supports the Agency's decision in this final rule to adopt the 10-hour provision.

FMCSA is convinced, based upon the research, that drivers need the opportunity for 7 to 8 hours of consecutive sleep to maintain alertness and performance, and reduce fatigue on a daily basis. The Agency recognizes there are individual differences in the amount of sleep needed. However, the research overwhelmingly supports that on average humans require between 7 and 8 consecutive hours of sleep per day to restore performance. The Agency must ensure that this rule sufficiently provides for the average sleep needs of all CMV drivers. Establishing a rule requiring less than the average would result in sleep restriction over time that would lead to increased fatigue and reduced performance, thus elevating crash risk and compromising safety.

Driver Health Impact

As discussed earlier, FMCSA found, despite its extensive literature review, little conclusive research to evaluate the specific impact or association between the specific hours driven or worked and CMV driver health. Anecdotally, one can conclude, based upon the research, that sleep plays a role in a person's overall health. Sleep deprivation has been associated with poorer health and increased health related problems, most notably cardiovascular disease, diabetes, and general health risks associated with obesity. The research supports 6-8 hours of sleep on average, as having a positive impact upon a person's health. Therefore, from a driver health standpoint, it is important that drivers be afforded the opportunity to obtain this amount of sleep. Based on the research that led to the 2003 rule, FMCSA knew that short sleep (sleep less than 6 hours) among drivers was a concern from both a safety and health perspective. As a result, FMCSA increased off-duty time from 8 to 10 consecutive hours, thereby increasing the driver's opportunity for sleep by up to an additional two hours per day. Data, highlighted earlier, from multiple sources confirm that CMV drivers are obtaining more sleep as a result of the 2003 HOS rule, averaging more than an extra hour daily.

Conclusion

After thorough consideration of the research studies, crash analysis reports, operational survey data, and comments to the NPRM, it is the Agency's best judgment that a requirement for a minimum of 10 consecutive hours off duty is essential to give drivers the time needed to obtain restorative sleep every day. The Agency believes scientific research is clear on the need for 7 to 8 hours of sleep to maintain alertness and performance. Lack of sufficient sleep results in greater risk of involvement in a fatigue-related crash, and is associated with health-related complications. To ensure that drivers are afforded the opportunity to obtain 7 to 8 hours of sleep, the rule must afford a period of time greater than the minimum required for sleep. Drivers report being more rested, now that they have been afforded the opportunity to obtain 7 to 8 hours of sleep due to the increased off-duty time. Adopting this provision acknowledges the importance of ensuring that the duration of the most recent sleep period before each duty tour is adequate to eliminate fatigue on a daily basis. The Agency's decision to adopt a 10-hour off-duty provision

results in no new cost implications, compared to the 2003 rule.

In addition, the Agency believes that a 10-hour off-duty period coupled with the 14-hour duty tour will promote movement within the industry toward a 24-hour clock. A 14-hour non-extendable duty tour, in combination with the longer off-duty period, enhances the opportunity for drivers to achieve restorative daily sleep compared to the pre-2003 rule by eliminating the opportunity for the duty period to be extended. Ensuring that drivers have the opportunity for sufficient sleep, coupled with moving toward a 24-hour schedule, will reduce driver fatigue, promote driver health and improve CMV transportation safety.

J.8. The 34-Hour Restart and 60/70-Hour Rules

Introduction

The following summarizes discussions contained in this and earlier sections of this preamble that are pertinent to the 34-hour restart and the 60/70 hour rules.

This rulemaking addresses the phenomenon of driver fatigue, *i.e.*, the partial and occasional total loss of alertness resulting from insufficient quantity or quality of sleep. Sleep plays a critical role in restoring mental and physical function, as well as in maintaining general health. For most healthy adults an average of 7 to 8 hours of sleep per 24-hour period has been shown to be sufficient to avoid detrimental effects on performance.

It has been well established that mental alertness and physical energy rise and fall at specific times during the circadian cycle, reaching lowest levels between midnight and 6 a.m., with a lesser but still pronounced dip in energy and alertness between noon and 6 p.m. Changes of two or more hours in sleep/wake times cause one to become out of phase with the circadian cycle.

Circadian de-synchronization results from irregular or rotating shifts that are not anchored to a 24-hour day (*i.e.*, that start and end at different times each day), resulting in poor quality sleep and leading to accumulated fatigue. Sleep loss over several days leads to a degradation in alertness and driving performance. Sleep loss over extended periods or during night work can result in cumulative fatigue. Recovery from cumulative fatigue requires an extended off-duty period. CMV drivers who repeatedly obtain less than their daily requirement of sleep incur a sleep debt of some magnitude. In serious cases, the resulting cumulative fatigue can increase the driver's crash risk.



BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
UNITED STATES DEPARTMENT OF TRANSPORTATION

**A PETITION FOR RECONSIDERATION OF THE FINAL RULE ON
HOURS OF SERVICE OF DRIVERS**

SUBMITTED BY
THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

Docket No. FMCSA-2004-19608

JAMES J. JOHNSTON
President
Owner-Operator Independent
Drivers Association, Inc.

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August 29, 2005

BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
UNITED STATES DEPARTMENT OF TRANSPORTATION

I. INTRODUCTION

OOIDA submits this petition to request FMCSA's reconsideration of two specific areas of the new Hours of Service rule. First to ask that the split sleeper berth provision from the 2003 rule be retained for team drivers. Second, OOIDA requests that both minimum rest periods under the new sleeper berth provision be excluded from the 14 hour on-duty limit for solo drivers. This amendment would be more consistent with the treatment of the 10 consecutive hours off-duty period that does not count toward on-duty time.

II. PROCEDURAL STATEMENT

A. OOIDA'S Right to Petition the FMCSA

The OOIDA petitions the Secretary of Transportation under 49 C.F.R. § 5.11 to amend the new rule contained in 49 C.F.R. § 395.1 that will take effect on October 1, 2005. The pertinent part of the new regulation states:

(g) Sleeper berths--

(1) Property-carrying commercial motor vehicle--

(i) In General. A driver who operates a property-carrying commercial motor vehicle equipped with a sleeper berth, as defined in Sec. Sec. 395.2 and 393.76 of this subchapter,

(A) Must, before driving, accumulate

- (1) At least 10 consecutive hours off duty;
- (2) At least 10 consecutive hours of sleeper-berth time;
- (3) A combination of consecutive sleeper-berth and off-duty time amounting to at least 10 hours; or

of

(4) The equivalent of at least 10 consecutive hours off duty if the driver does not comply with paragraph (g)(1)(i)(A)(1), (2), or (3)

this section;

(B) May not drive more than 11 hours following one of the 10-hour off-duty periods specified in paragraph (g)(1)(i)(A)(1) through (4) of this section; and

(C) May not drive after the 14th hour after coming on duty following one of the 10-hour off-duty periods specified in paragraph (g)(1)(i)(A)(1) through (4) of this section; and

(D) Must exclude from the calculation of the 14-hour limit any sleeper berth period of at least 8 but less than 10 consecutive hours.

(ii) Specific requirements.--The following rules apply in determining compliance with paragraph (g)(1)(i) of this section:

(A) The term "equivalent of at least 10 consecutive hours off duty" means a period of

(1) At least 8 but less than 10 consecutive hours in a sleeper berth, and

(2) A separate period of at least 2 but less than 10 consecutive hours either in the sleeper berth or off duty, or any combination thereof.

(B) Calculation of the 11-hour driving limit includes all driving time; compliance must be re-calculated from the end of the first of the two periods used to comply with paragraph (g)(1)(ii)(A) of this section.

(C) Calculation of the 14-hour limit includes all time except any sleeper-berth period of at least 8 but less than 10 consecutive hours; compliance must be re-calculated from the end of the first of the two periods used to comply with the requirements of paragraph (g)(1)(ii)(A) of this section.

B. Amendment Related to Two Hour Period

OOIDA proposes that section 49 C.F.R. § 395.1(g)(1)(ii)(C) be amended to state:

(C) Calculation of the 14-hour limit includes all time except (1) any sleeper-berth period of at least 8 but less than 10 consecutive hours; and (2) any sleeper berth period and/or off-duty period of at least two but less than ten consecutive hours; compliance must be re-calculated from the end of the first of the two periods used to comply with the requirements of paragraph (g)(1)(ii)(A) of this section.

C. Amendment Related to 2003 Sleeper Berth Rule.

The definitions in 49 C.F.R. § 395.2 are amended to include the following:

"Solo Driver means an individual driver with sole responsibility for the operation of a commercial motor vehicle.

“Team Driver means one of two drivers accompanying each other in the alternate operation of the same commercial motor vehicle”

New rule 49 C.F.R. § 395.1(g)(1) would be retitled as follows:

“(g) Sleeper berths__ (1) Property carrying commercial motor vehicle --Solo Driver--(i) In General. A Solo Driver who operates a property-carrying commercial motor vehicle...”

The new 49 C.F.R. § 395.1(g) would be amended with a new subsection that retains, for team drivers, the 2003 sleeper berth exemption as follows:

(g) Sleeper berths

*([new subsection]) General property-carrying commercial motor vehicle -- **Team Drivers.***

*A **team driver** who is driving a property-carrying commercial motor vehicle that is equipped with a sleeper berth, as defined in §§ 395.2 and 393.76 of this subchapter, may accumulate the equivalent of 10 consecutive hours of off-duty time by taking a combination of at least 10 consecutive hours off-duty and sleeper berth time; or by taking two periods of rest in the sleeper berth, providing:*

(i) Neither rest period is shorter than two hours;

(ii) The driving time in the period immediately before and after each rest period, when added together, does not exceed 11 hours;

(iii) The driver does not drive after the 14th hour after coming on duty following 10 hours off duty, where the 14th hour is calculated:

(A) by excluding any sleeper berth period of at least 2 hours which, when added to a subsequent sleeper berth period, totals at least 10 hours, and

(B) by including all on-duty time, all off-duty time not spent in the sleeper berth, all sleeper berth periods of less than 2 hours, and any sleeper berth period not described in paragraph

(g)(1)(iii)(A); and

(iv) The driver may not return to driving subject to the normal limits under § 395.3 without

taking at least 10 consecutive hours off duty, at least 10 consecutive hours in the sleeper berth,

or a combination of at least 10 consecutive hours off duty and sleeper berth time.

*(Amendments in **bold**)*

III. THE INTEREST OF THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

The Owner Operator Independent Drivers Association, Inc., (“OOIDA” or “Association”) is a not-for-profit corporation incorporated in 1973 under the laws of the State of

Missouri, with its principal place of business in Grain Valley, Missouri. OOIDA is the largest international trade association representing the interests of independent owner-operators and professional drivers on all issues that affect small business truckers. The more than 128,000 members of OOIDA are small-business men and women located in all 50 states and Canada who collectively own and operate more than 185,000 individual heavy-duty trucks. Owner-operators represent nearly half of the total number of Class 7 and 8 trucks operated in the United States. A large segment of OOIDA's members have their own DOT authority to operate in interstate commerce. The mailing address of the Association is:

Owner Operator Independent Drivers Association, Inc.
P.O. Box 1000
1 NW OOIDA Drive
Grain Valley, Missouri 64029
www.oida.com

The Association actively promotes the views of small business truckers and professional drivers through its interaction with state and federal government agencies, legislatures, the courts, other trade associations, and private businesses to advance an equitable and safe environment for commercial drivers. OOIDA is active in all aspects of highway safety and transportation policy, and represents the positions of small business truckers in numerous committees and various forums on the local, state, national, and international levels.

IV. EVIDENCE IN SUPPORT OF THIS PETITION

A. Allowing Team Drivers To Retain The 2003 Sleeper Berth Rule.

OOIDA believes that the nature of team-driver operations allows them to operate particularly well under the 2003 split sleeper berth rule, but would cause them to operate particularly poorly under the new rule. Not only do team drivers lose their business advantage

operating under the new rule, but they also lose their ability to adopt the type of routine schedule that is conducive to getting sufficient rest. Under the 2003 sleeper berth rule, team drivers have been able to achieve a synchronized, routine rest/work schedule that allows drivers to divide up the work day evenly and gives both a better opportunity for regular periods of extended sleep.

Team drivers have certain advantages that help them get appropriate rest. Under the 2003 rule, while one person is on-duty, the other can be off duty. This means that while one driver operates, the other can take significant off-duty time in the sleeper and be ready to drive when the first driver gets off duty. Both drivers can also coordinate their schedules for meals, exercise, and to take care of business during the same rest stop. Under the new rules, such coordination is nearly impossible. Team drivers will not be able to synchronize their schedules in a way that allows them to take the breaks in a routine, efficient, 24 hour schedule.

The agency's abandonment of the sleeper berth rules, at least as far as team drivers go, was based in part on the assumption that a schedule, such as one where the driver goes on duty for five hours and then off-duty for five hours, only gives a driver a five hour window of opportunity to obtain rest. This is simply not the case with team drivers. Often the period of a driver's rest is a combination of the length of the other driver's driving period plus that other driver's breaks to take care of business.

Taking care of business means doing many different personal and non-driving on-duty activities that drivers must attend to on the road. These include eating a meal, showering, refueling, using the rest room, taking a nap, calling dispatch, and getting maintenance on the truck.

Here is one example of how team drivers have the opportunity to obtain more rest than

their periods of driving would suggest. Driver 1 is responsible for overseeing the loading of the vehicle for two hours. He is on duty loading while driver 2 is in the sleeper. Driver 1 then drives for 5 hours. At the end of this period, driver 2 has been in the sleeper for 7 hours. Driver 1 then goes into the sleeper when driver 2 gets out of the sleeper. Driver 2 fuels for a half hour and eats for 1 hour. Then driver 2 drives for 2.5 hours, takes a half hour break, and then drives for 2.5 more hours. Driver 1 has now been in the sleeper for 7 hours. Both drivers have driven for 5 hours, but both drivers have had the opportunity for an extended period of uninterrupted rest in the bunk. There are numerous scenarios that can illustrate the same point.

Under the new sleeper berth rule, one driver is virtually imprisoned in the sleeper berth for a minimum of eight hours, and the other driver is pressured to drive at least eight or ten hours in one stretch while the other driver is off-duty. The most frequent complaint OOIDA has received from team drivers since the new rule was announced, was that it would require them to drive long stretches that wear them out. They prefer being able to switch drivers after much shorter periods of time, which gives them more frequent rest opportunities, and leaves them more refreshed each time they drive. Drivers in these circumstances are clearly describing a preference for a system that makes them safer drivers.

Under the new rule, however, in order for team drivers to coordinate their schedules, they will be forced to make inefficient additional stops, or one driver will be required to drive for at least eight hours at a time. By the time the driver in the sleeper can leave to take care of business, the clock is ticking on other driver's available driving time. At that time they may either be out on the road and the driver who has been sleeping has missed an opportunity to take care of business, or they take another break that cuts into the other driver's on-duty hours.

Under the 2003 sleeper berth rule, team drivers have had the advantage of not being pushed to drive long periods of time. They can also deal much more effectively with the demands of shippers, receivers, and carriers to meet deadlines. This is a big advantage over the solo driver who may face very different schedule demands each day. For a team running a regular schedule under the 2003 rule, there can be one driver on duty almost any time of the day to attend to any work demand or load schedule, without either driver having to stretch themselves beyond their normal routine. Therefore, team operations are much more conducive to maintaining a consistent 24 hour schedule.

Finally, the nature of the work/rest periods of team drivers under the new rule presents particular problems for teams who haul hazardous materials in compliance with 49 C.F.R. § 397.5 and munitions haulers in compliance with the Department of Defense (DOD), Surface Deployment and Distribution Command ("SDDC") Freight Traffic Rules Publication No. 1C, Item 30. These rules require constant attendance to the load being hauled. Being in the sleeper is not attending to the load. Under these circumstances, the driver who must stay in the sleeper is no help to the other driver who wants to stop and take care of business but cannot do so without violating the attendance rules. These constraints make it impossible for team drivers to avail themselves of the 8-hour and 2-hour rule.

The Agency presented a rational reason to abandon the 2003 sleeper berth rule for solo drivers. But team drivers will have less of an opportunity to settle into a stable work/rest cycle under the new rule and will have fewer opportunities to take breaks and take care of business. These factors will contribute to a less healthy working environment for team drivers.

B. Allowing Minimum Two-Hour Periods To Toll the 14 Hour Period

OOIDA asks the Agency to permit both minimum rest periods to be excluded from the 14 hour on-duty limit. This would provide several benefits to the health of drivers. As OOIDA stated in its comments to this docket in March 2005, by far, the most negative impact of the 2003 rule is that drivers are taking fewer naps and rest periods during the day than they did under the old rule. In the OOIDA survey, more than 60 percent of drivers said they have chosen to forego naps, meal breaks, and exercise since the current rules went into effect. In order to take such breaks under the 14 hour limitation, they must sacrifice their available on-duty and driving time. Drivers must preserve their available on-duty time, whether or not they use all 11 hours of driving time, in case unpredictable factors place demands on that time. A driver does not know when traffic, weather conditions, or other factors will impact his schedule, or know whether and for how long a shipper or receiver will require them to wait at the loading docks. Because the clock keeps ticking on the 14 hour daily limit, they must reserve as much of that time for work as possible.

The NPRM cited several studies "addressing the effectiveness of naps and breaks in alleviating or preventing fatigue and drowsiness (Wylie, C.D., et al. (1996, 1997, 1998) and other studies referenced in Freund Annotated Literature Review (1999))." OOIDA members concur with the studies that naps and driving breaks are beneficial to drivers.

The only incentive that the new rule gives to a driver to use a minimum two-hour break is that he or she will be able to get a start on the next day after 8 hours, two hours early. But they also give up the flexibility they used to have with the full 10 hour break, and the new rule does nothing to alleviate drivers' disincentives to take a break that cuts into available driving time.

OOIDA does not see the rationale for allowing drivers to take a minimum of 10 consecutive hours off-duty to reset the maximum daily driving time and 14-hour clock, but on

the other hand not exclude the two consecutive hours of minimum off-duty time from the 14-hour calculation when combined with 8 consecutive hours of confinement in the sleeper berth. Either 8 consecutive hours of daily rest is sufficient, or it is not. Regardless, no one, including the Agency, can force a driver to sleep at any given time. If a driver should have difficulty obtaining sleep while confined to the sleeper berth for an extended period, it seems counter-intuitive to discourage a subsequent nap by counting it against the driver's available on-duty time.

A more flexible rule would provide several benefits to the health of the driver. First, it would allow drivers to take a break to nap and take care of business without worrying about the pressure from carriers, brokers, and shippers to use every available minute of driving time. Under the 2003 rule drivers feel as though they need to push themselves to drive as much as they can before taking a break.

If drivers could stop the 14 hour period for two hours, drivers would have more of an opportunity to maintain a twenty-four hour clock. Under the new rule, drivers who take a two-hour break are allowed to go back on-duty after a subsequent minimum eight consecutive hour period off-duty in the sleeper. This shortens the work/rest cycle by two hours – two hours the carrier or shipper is going to pressure him to use.

Under the OOIDA proposal, drivers would not only be able to get the break they need in the middle of the day to take on the remainder of the day in a better physical and mental state than they would be if they just kept driving through the day, but it would also help the driver maintain a 24 hour clock. The OOIDA proposal does not create more driving time, but it would allow more drivers to be better rested and prepared to more safely finish their driving shift than

if they had to take it all in one long period of time.

VI. CONCLUSION

OOIDA understands that FMCSA has worked hard to meet the demands of many different interests in the publication of the new rules. OOIDA respectfully request that the Agency reconsider its new Hours of Service rule on these two issues. With the changes OOIDA suggests, the agency would be able to achieve a better working environment for drivers that will make them healthier, better rested, and safer on the road. It will also make it significantly easier to comply with the Hours of Service rules. Thank you for your consideration of this Petition.

Respectfully submitted,

JAMES J. JOHNSTON
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August 29, 2005



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U.S. Department
of Transportation

Federal Motor Carrier
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Reply to: MC-CCR

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FMCSA-2004-19608-2437

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U.S. DEPARTMENT OF
TRANSPORTATION
DOT/CTS

Dear Mr. Cullen:

This is in response to your August 29, 2005, petition on behalf of the Owner-Operator Independent Drivers Association (OOIDA) for reconsideration of two provisions of the hours-of-service rule published on August 25, 2005 [70 FR 49978]. For the reasons given below, the Federal Motor Carrier Safety Administration (FMCSA) has decided to deny your petition.

OOIDA asked, first, "that the split sleeper berth provision from the 2003 rule be retained for team drivers," and, second, "that both minimum rest periods under the new sleeper berth provision be excluded from the 14-hour on-duty limit for solo drivers."

Team Drivers Using Sleeper Berths. According to your petition, "[n]ot only do team drivers lose their business advantage operating under the new rule, but they also lose their ability to adopt the type of routine schedule that is conducive to getting sufficient rest. . . . The most frequent complaint OOIDA has received from team drivers since the new rule was announced, was that it would require them to drive long stretches that wear them out. They prefer being able to switch drivers after much shorter periods of time, which gives them more frequent rest opportunities, and leaves them more refreshed each time they drive."

Although the sleeper-berth provisions of the 2005 rule will require most, if not all, team driver operations to revise their scheduling practices, the elimination of fragmented rest periods in the final rule ensures that drivers can obtain 7-8 hours of uninterrupted sleep during one sleeper-berth period. This action provides drivers with a work/rest schedule that is more likely to prevent fatigue.

FMCSA collected and reviewed a wide variety of research on driver fatigue. The scientific studies relied upon by the Agency and cited at length in the final rule do not support driver claims that short, but more frequent, periods of rest are just as good at preventing fatigue as a

single extended sleep period. The research shows that most individuals require 7-8 consecutive hours of sleep every day to maintain proper mental and physical functioning. There is no doubt that a driver is temporarily refreshed after a shorter period in a sleeper berth – that is why so many sleep researchers recommend naps – but without an extended sleep period of 7-8 consecutive hours, a driver will begin to accumulate fatigue. OOIDA presented no research that would contradict these conclusions. FMCSA has therefore decided to deny this part of OOIDA's petition for reconsideration.

Solo Drivers Using Sleeper Berths. The OOIDA petition proposed to allow solo sleeper-berth drivers to exclude from their calculations of the 14-hour limit both the 8-hour sleeper-berth period (which is already excluded) and the 2-hour off-duty period. The petition repeated the results of a member survey on the 2003 rule, which showed that drivers felt pressure to sacrifice breaks in order to maximize work within the 14-hour driving window. The OOIDA survey did not focus on sleeper-berth drivers, and the 2005 sleeper-berth rule is significantly different than the one adopted in 2003. The relevance of the survey to the question at hand is not apparent.

OOIDA argued that "the new rule does nothing to alleviate drivers' disincentives to take a break that cuts into available driving time." The 2-hour break for sleeper-berth drivers in the 2005 rule is mandatory, so there is no question of incentives or disincentives. Yet OOIDA argues that its request "would allow drivers to take a break to nap and take care of business without worrying about the pressure from carriers, brokers, and shippers to use every available minute of driving time." The mandatory 2-hour break allows sleeper-berth drivers to do precisely that.

The OOIDA request would give solo sleeper-berth drivers a near-daily opportunity to drive at the end of the 16th hour after coming on duty, although not all of that 16-hour period would be on-duty time and not all drivers would arrange their schedules to utilize that option. OOIDA presented no information, data, studies, or research addressing the safety implications of this proposed change. The August 25 final rule allowed a 16-hour on-duty window twice a week, but only for drivers involved in short-haul operations with vehicles that do not require a commercial driver's license [49 CFR 395.1(e)(2)]. The vehicles used by solo sleeper-berth drivers, and the conditions under which they operate, are so fundamentally different that our analysis of the safety implications of the short-haul provision are simply not applicable to OOIDA's proposal. FMCSA therefore declines to grant this portion of OOIDA's request.

Should you have any questions or need additional information, you may contact Thomas Yager, Chief, FMCSA Driver and Carrier Operations Division, at (202) 366-4009, or e-mail him at tom.yager@fmcsa.dot.gov.

Sincerely yours,



Annette M. Sandberg



Erin-608-251-8192

TRANSPORT TOPICS July 10, 2006 — 5

to Merge CD&L

panies will allow Velocity to age its technology and oper- infrastructure across CD&Ls diverse and loyal cus- base," said Vincent Wasik, city's chairman and chief tive officer.

said that both his company CD&L, South Hackensack, use owner-operators in pro- transportation.

sell Reardon, CD&L's chief al officer, said in an inter- view that after the morg-

er, the two companies would operate together under the Velocity name. He said both provide last-mile delivery for shippers in the banking, pharmaceu- tical, office supply and industries.

have an overlapping pres- in the Northeast and we're ly stronger on the West and in the South, whereas y Express is bigger in the st," Reardon said.

United States, UPS and dominate the parcel- market for private busi- The two corporations are ally Nos. 1 and 2, respec- in the TRANSPORT TOPICS of the largest U.S. and an for-hire carriers, UPS enue of \$42.59 billion in d FedEx had revenue of billion for its fiscal year ay 31.

U.S. Postal Service also s package and express

ee VELOCITY, p. 28)

Group Slams Revised HOS Rule As Nearly Identical to the Last

By Sean McNally
Staff Reporter

The lead group challenging the federal government's new truck driver work rule told an appeals court that the revised version was so similar to the rule courts already have rejected that the current incarnation should also be invalidated.

The Federal Motor Carrier Safety Administration issued its first attempted revision of the 60-year-old hours-of-service regulation in April 2003. The revision expanded the allowable driving time to 11 hours from 10 hours and trimmed the permitted work-day to 14 consecutive hours from 16 hours.

"FMCSA's justifications for expanding driving hours are as inadequate today as they were two years ago, and the rule again should be set aside," the Public Citizen-led group argued. "The record establishes overwhelmingly that such staggering workloads subvert highway safety and imperil drivers' health."

Public Citizen is part of a coalition that includes the Teamsters union, Advocates for Highway and Auto Safety, Citizens for Reliable and Safe Highways and Parents Against Tired Truckers, challenging the revised HOS rule in the U.S. Circuit Court of Appeals for the District of Columbia.

In July 2004, the appeals court



A driver at a truck stop in Virginia makes entries in his log book. Groups are challenging FMCSA's expanded work hour rule.

for the District of Columbia invalidated FMCSA's 2003 attempt to rewrite the HOS rule, agreeing with Public Citizen, among other things, that the truck-safety agency had not considered the rule's effect on driver health, as Congress had intended.

Then, in August 2005, "FMCSA issued a new rule virtually identical to the one the court invalidated," Public Citizen said on behalf of the coalition.

"Instead of addressing the flaws the court identified in the rule's rationale, FMCSA stood pat on the significant driving increases. Moreover, the agency paid only lip service to its statutory obligation to

'ensure' that truck driving 'does not have a deleterious effect on the physical condition of the operators,'" Public Citizen said in a brief filed June 26.

"The 2005 rule suffers from the same shortcomings as the near-identical 2003 rule," the group said, adding that the agency "reissued the 11-hour limit with more ink, but no better rationale."

The 2003 revision also increased the mandated off-duty period to 10 hours from eight hours and allowed drivers to reset their weekly work allowances by taking 34 consecutive hours off.

(See HOS, p. 28)

Oil Makers Introduce Redesigned Products For '07 Engines; Advise They Will Cost More

By Bruce Harmon
Managing Editor

Manufacturers of heavy-duty diesel engine oils said they have introduced — or plan to soon introduce — reformulated lubricants designed to meet the requirements of 2007 truck engines. And like just about everything else associated with meeting the government's tightened emission standards, the new oils will cost more.

The new oils are made to meet the American Petroleum Insti-

ment, oil company representa- tives said.

Phil Burnett, brand strategy manager for Shell Transportation Lubricants, said at a recent press conference introducing Shell's line-up of '07 engine oils that the new products required extensive research and use more expensive additive chemicals, so the company's costs are 10% to 15% higher.

Also, "the overall industry recognizes there is more testing needed for this specification, so it will cost more — about 15% to 20%," said Michael Smith,

lower emission levels for nitrogen oxides and particulate matter.

Dan Arcy, Shell's technical marketing manager, said higher levels of exhaust gas recirculation to cut NOx emissions will cause 2007 engines to run hotter, which will tend to break down engine oils more quickly. Also, the new engines use particulate filters in their exhaust systems and older engine oils would generate more ash, potentially clogging the DPTs and creating a need for more frequent maintenance or



c the city government

HOS Revisions Criticized

(Continued from p. 5)

FMCSA subsequently attempted to have Congress write the vacated 2003 rule into law. When that attempt failed, the agency published a new rule in August 2005, changing the rule's sleeper-berth provisions and allowing longer work days for short-haul, inter-city drivers.

The Owner-Operator Independent Drivers Association, the Truck-Land Carriers Association and several state associations have filed a separate lawsuit challenging the agency's new sleeper-berth rules.

In its challenge to that 2005 rule, Public Citizen called the regulation "arbitrary and capricious" because it expanded the maximum driving time "without establishing that the increase is safe," instituted the 34-hour restart "dramatically increasing permissible weekly driving," and again did not account for driver health and "relies on a flawed regulatory analysis."

"FMCSA sacrificed driver health and public safety for industry productivity, scuttled longstanding policy by increasing maximum consecutive driving hours from 10 to 11; and recklessly adopted a 'restart' allowing drivers to reset weekly hours after only 34 hours off duty, increasing permissible weekly driving hours by 26-28% and weekly on-duty hours by 40%," the group said.

"FMCSA misused the scientific and medical record to manufacture uncertainty regarding the safety and health consequences of those longer work/driving hours where no uncertainty exists."

Public Citizen said in its brief that FMCSA attempted to "evade its obligation" to prove that the expanded hours were safe by "claiming that drivers cannot 'realistically' drive the longer daily and weekly hours. In other words, the new maximums, especially for weekly driving hours, are so high that FMCSA does not see how truckers can possibly use

them," Public Citizen said.

The advocacy group went on to criticize FMCSA for its regulatory impact analysis, which it said, "claims that a more safety-conscious rule will increase industry costs."

"FMCSA cannot have it both ways, downplaying the significance of longer hours in the preamble to avoid justifying them, while simultaneously playing up the additional hours in the [analysis] to show huge productivity losses under a 10-hour driving limit and lengthened [or eliminated] weekly restart," the brief said.

FMCSA said it would not comment on ongoing litigation. In the past, the agency has defended the rule by saying it is based on "sound science." The agency's initial brief is due to be filed July 11.

American Trucking Associations has petitioned the court to file in support of FMCSA, and that filing will be made later this summer.

Final briefs in the case are due Sept. 29, but no date has been scheduled yet for oral arguments.

EPA Issues On Retrofits

The Environmental Protection Agency has issued guidance on how retrofit projects can be used to help meet federal quality standards.

The guidance "discusses emission reductions from diesel retrofit projects can be used in a state implementation plan to improve air quality," EPA said, adding that "emission reductions are quantifiable, enforceable and permanent" with retrofit programs.

The guidance is part of a plan to support the agency's Emissions Reduction program under the federal Air Quality Improvement Program.

States that do not meet

Teamsters

(Continued from p. 1)

Both sides must deal with other while juggling other. UPS continues to compete the largely nonunion FedEx. The two companies have locally ranked Nos. 1 and 2 in TRANSPORT TOPICS 100 list. Largest for-hire carriers in United States and Canada.

Besides its package work, it has a large presence in the market with its FedEx Freight division, which is slated to go for next month with its purchase of Watkins Motor (6-5, p. 1).

Meanwhile, the Teamsters have made clear that they will organize owner-operators who own parcels at the Ground division besides the FedEx LTL work.

UPS and the Teamsters expect negotiations for a new package workers contract next month September, although the current six-year labor pact runs the July 31, 2008. Strong union is particularly concerned about pension and health issues and neither side was spooked shippers into divest parcels to competitors.

The company grappled with a 15-day parcel strike by the Teamsters in 1997, but the two reached an agreement in 2000 weeks before that contract expires.

While coming to terms with

SCS Unit Sells Jevic for \$40 Million

(Continued from p. 1)

Freight Line, the company's other LTL subsidiary.

"We believe Sain is poised to increase share in newer markets, including the western and upper Midwestern regions of the United States," he said during a July 3 conference call with Wall Street analysts.

Satish Jindal, president of SJ Consulting Group, told TT the sale of Jevic was not a surprise because SCS officials "were never able to integrate the back-office operations of Jevic with Sain in order to reduce operating costs."

Truckess said SCS "will rebrand the company's corporate identity to Sain during the second half of 2006," and move its headquarters to Duluth, Ga., from Kansas City. He also announced he will be replaced as CEO by Rick O'Dell, president of Sain, by the end of the year.

The company expects to complete the relocation of the office, which has seven employees, by the end of the year.

"From a perception standpoint, it makes no sense to have administrative operations in multiple locations," said Jindal.

Jevic, based in Delanco, N.J., hauls chemicals and hazardous materials for the LTL and truck-

an operating ratio of 102.5.

Sain, which is based in Duluth, Ga., earned \$12.5 million on revenue of \$204.6 million during the quarter and reported an operating ratio of 93.9.

Operating ratio represents expenses as a percentage of revenue.

Yellow Corp., now known as YRC Worldwide Inc., spun off SCS to Truckess and other shareholders in September 2002. SCS ranks No. 24 on the TRANSPORT TOPICS 100 list of the largest U.S. and Canadian for-hire carriers.

Truckess told TT Jevic will have a better chance of becoming profitable as a privately held firm.

"The public [capital] markets tend to be very short-term focused and Jevic needs more time" to turn itself around, he said.

Dave Gorman, who has been Jevic's chief executive officer since August, will continue in that position, Truckess said.

The sale comes nearly six months after an official at Starboard Value and Master Opportunity Fund, one of SCS' largest shareholders, called for the company to sell Jevic (1-16, p. 4). At the time, Jeffrey Smith, the fund's managing director, said Jevic "hinders the value of SCS in the market."

Looking ahead, Truckess noted much of Sain's business focuses on

ed opportunities to penetrate the three-plus day inter-regional market with continued service enhancements," he said.

Sain has nearly 7,100 employees and operates 128 terminals across the country.

Jindal said there is growth potential in the inter-regional LTL market, particularly in the Midwest.

"A lot of this success will depend on how the far the routes are and whether there are enough team drivers to haul loads," he said.

Truckess said the Midwestern market is attractive to SCS because it has been there only since it acquired LTL firm Clark Bros. in February 2004.

"This is an area where we did not have a lot of name and brand recognition," he said.

Truckess has been in his current position since January 2000 and will serve as Sain's non-executive chairman after stepping down as CEO, O'Dell joined Sain in 1997.

Truckess also said Jim Darby, Sain's vice president of finance and administration, will become chief financial officer Sept. 1. He will replace Jim Bellinghousen, who is stepping down.

SCS said it will record an after-tax charge of \$47 million or \$3.15 a share for Jevic during the second quarter of a month.